STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP002483-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK H. DALTON,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF
CONVICTION AND ORDER OF THE
CIRCUIT COURT FOR WASHINGTON COUNTY,
HONORABLE TODD K. MARTENS, PRESIDING

BRIEF FOR PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Was it ineffective assistance of counsel for failing to file a motion to suppress blood results under ***Missouri v. McNeely***, 569 U.S. __, 133 S.Ct. 1552 (2013)?

Circuit court answered: No.

2. Was it an erroneous exercise of discretion for the circuit court to consider aggravating and mitigating factors, in light of ***Birchfield v. North Dakota***, 579 U.S. __, 136 S. Ct. 2160 (2016), including taking into account Mr. Dalton's refusal to submit to an evidentiary chemical test of his blood, when imposing a sentence?

Circuit court answered: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is necessary in that the issues raised can be resolved using well-established principles set forth in existing published case law.

STATEMENT OF FACTS

Facts in addition to those set forth by the Mr. Dalton, Defendant-Appellant, are contained in the Argument section as needed.

ARGUMENT

I. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT FILING A MERITLESS MOTION TO SUPPRESS BLOOD RESULTS UNDER *MISSOURI v. MCNEELY*, 569 U.S. __, 133 S.Ct. 1552 (2013).

Mr. Dalton sought to withdraw his plea alleging that trial counsel, Attorney Amber Herda, was ineffective for failing to file a motion to suppress blood results under ***Missouri v. McNeely***, 569 U.S. __, 133 S.Ct. 1552 (2013). A post-sentencing plea withdrawal motion should be granted only to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The defendant bears the burden of proving by clear and convincing evidence that a manifest injustice exists. ***State v. Lee***, 88 Wis. 2d 239, 248, 276 N.W.2d 268 (1979).

Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To establish ineffective assistance, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687

(1984). An attorney is not deficient for failing to pursue a meritless motion. ***State v. Wheat***, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441. "Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit." ***Wheat***, 2002 WI App at ¶ 14; ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

Mr. Dalton claims that trial counsel should have brought a motion to suppress the blood results under ***McNeely***, and that had the blood results been suppressed, he would not have entered a plea. After remand by the Court of Appeals, the circuit court held a ***Machner*** hearing over the course of two days. [R.113; R.114] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The circuit court determined that there were exigent circumstances to justify the warrantless blood draw in this case. [R.114:74-88] The circuit court further found that trial counsel was not ineffective for failing to file a meritless motion under ***McNeely***. [R.114:88-90] Therefore, the circuit court

concluded that Mr. Dalton had not established that he was entitled to withdraw his plea based on ineffective assistance of counsel. [R.114:90]

Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. *See* ***State v. Tullberg***, 2014 WI 134, ¶ 27, 359 Wis. 2d 421, 857 N.W.2d 120. An appellate court utilizes a two-step inquiry when presented with a question of constitutional fact. *See* ***id.*** The court must (1) review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous; and (2) independently apply constitutional principles to those facts. ***Id.*** When determining whether exigent circumstances justified a warrantless search and whether a law enforcement officer had probable cause, the court applies this two-step inquiry. *See* ***id.*** at ¶ 28.

In ***McNeely***, the Supreme Court held that "the natural metabolization of alcohol in the bloodstream" does not create a "*per se* exigency that justifies an exception to the Fourth

Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." ***McNeely***, 133 S. Ct. at 1556. However, the ***McNeely*** Court left open the possibility that exigent circumstances could still exist in drunk-driving investigations sufficient to justify conducting a blood test without a warrant. *See* ***McNeely***, 133 S. Ct. at 1568; *see also*, ***Tullberg***, 2014 WI 134 at ¶ 42. The exigent circumstances exception "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." ***McNeely***, 133 S. Ct. at 1558 (citation omitted).

The Court noted several circumstances that could make obtaining a warrant impractical, such as "special facts," ***id.*** at 1557, 1560, 1561, significant delay in testing will negatively affect the probative value of the results, ***id.*** at 1561, 1568, and potential delays in the warrant application process, ***id.*** at 1562-63, 1568.

> A warrantless, nonconsensual blood draw of a suspected drunken driver complies with the Fourth Amendment if:

> (1) there was probable cause to believe the blood would furnish evidence of a crime; (2) the blood was drawn under exigent circumstances; (3) the blood was drawn in a reasonable manner; and (4) the suspect did not reasonably object to the blood draw.

Tullberg, 2014 WI 134 at ¶ 31 (*citing* ***Schmerber v. California***, 384 U.S. 757, 769-71 (1966))(quoted source omitted). Except for exigency, Mr. Dalton concedes that three of the four requirements outlined in ***Schmerber*** for conducting a lawful search and seizure of a person's blood incident to arrest were satisfied.[1] "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined in a case by case based on the totality of the circumstances." ***McNeely***, 133 S. Ct. at 1563.

In this case, the circuit court found that Mr. Dalton's trial attorney, Attorney Herda, was not deficient for failing to pursue the meritless motion to suppress under ***McNeely***. [R.114:88-90] The circuit court specifically found that the

[1] According to the testimony, and representations by Mr. Dalton's attorney, Deputy Dirk Stolz had probable cause, Mr. Dalton's blood was drawn in a medically accepted manner and was completed without any difficulties or objections utilizing methods typically associated with a blood draw. [R.114:41-44, 64] *Cf.* ***Schmerber v. California***, 384 U.S. 757, 771 (1966)(the blood test was a reasonable way to recover the evidence because it "involve[d] virtually no risk, trauma, or pain," was conducted in a reasonable fashion "in a hospital environment according to accepted medical practices.")

totality of circumstances of the facts of this case gave rise to the existence of exigent circumstances. [R.114:74-88] The circuit court concluded that the facts supported Deputy Stolz's reasonable belief that the delay in obtaining a warrant would have resulted in the loss or dissipation of evidence that being the alcohol concentration in Mr. Dalton's blood. [R.114:76-77, 82, 88]

The circuit court based its conclusion on the following factual findings. Law enforcement was dispatched to the scene of this crash at approximately 10:07 p.m., which was shortly before or contemporaneous with the dispatch call. [R.114:7, 77] When law enforcement arrived, Mr. Dalton was unresponsive and Deputy Stolz noticed a strong odor of intoxicants on Mr. Dalton. [R.114:11-12, 39, 77] Later, at the hospital, Deputy Stolz observed bloodshot eyes. [R.114:39, 77] Deputy Stolz talked to the passenger, briefly, and was told Mr. Dalton had been drinking, had been driving erratically, lost control and rolled the vehicle. [R.114:10, 38,

77] Deputy Stolz took some time to survey, examine the scene, and look for yaw marks. [R.114:10-11, 77]

Mr. Dalton needed to be extricated from the vehicle, and he was transported by ambulance approximately one (1) mile to the landing site for the helicopter that picked him up and flew him by Flight for Life to Froedtert in Milwaukee. [R.114:12, 14, 77-78; R.113:45-46] Deputy Stolz drove to the hospital and waited until Mr. Dalton was moved to the intensive care unit where he could talk to Mr. Dalton. [R.114:19, 26, 28, 34, 41] Once Deputy Stolz talked to Mr. Dalton, he made certain observations that led him to believe the Mr. Dalton was under the influence of an intoxicant. [R.114:38-39, 78]

At this point, Deputy Stolz knew the following: he had witness statements that confirmed drinking and driving; he had observed the circumstances of the crash; he had made observations at the scene; he had made observations of Mr. Dalton; and other factors, relevant to the arrest decision. [R.114:9-17, 38-39, 78] Having accumulated all of this

information, Deputy Stolz decided to place Mr. Dalton under arrest for operating while under the influence of an intoxicant. [R.114:28, 78] At 12:05 a.m., at least an hour and 58 minutes after the driving, Deputy Stolz read the Informing the Accused form to Mr. Dalton and asked him to submit to an evidentiary chemical test of his blood. [R.114:28, 46, 78-79] Mr. Dalton refused, with some profanities included. [R.114:28, 79] Under the circumstances, Deputy Stolz decided to have Mr. Dalton's blood drawn without a warrant. [R.114:29, 30, 79]

The circuit court noted the procedure for obtaining a search warrant in Washington County. The procedure requires the law enforcement officer to call a duty judge, prepare an affidavit and a warrant, make arrangements to meet with the judge, the judge meets the deputy, reviews the affidavit and warrant, and signs them. [R.114:21-22, 78-79; R.113:35, 60, 86] There were no e-mail or fax procedures available in Washington County. [R.114:21-22, 79; R.113:36, 37, 60] The law enforcement officer then has to go

back to the hospital to get the blood draw. [R.114:79; R.113:35]

The circuit court made findings, based on the procedure, relative to time, to obtain a search warrant. The testimony was that it would take 15 to 25 minutes to fill out the affidavit and search warrant forms, and about ten minutes for the judge to review the warrant and sign it. [R.114:80-81; R.113:62, 75] Due to the distance from the hospital, it would take about 90 minutes round trip drive time. [R.114:45, 81] In total, the entire search warrant process would take at least two hours without assistance, and at least an hour to an hour and a half to accomplish it with assistance. [R.114:45-46, 82; R.113:64-65]

The circuit court rejected Mr. Dalton's claim that there was a multitude of law enforcement officers waiting to help Deputy Stolz in the event Mr. Dalton refused to submit to an evidentiary chemical test of his blood. [R.114:79] The circuit court pointed out, based on the testimony of Captain Martin Schulteis, that of the ten (10) deputies working on

December 12, 2013, Deputies Stolz and Charles Vanderheiden were investigating Mr. Dalton's accident; two deputies were handling a high-risk stop which should be handled by four deputies, but they were shorthanded; another deputy, who was held over from second shift, was sent home after clearing the scene of this accident; the shift commander and three (3) other deputies were called to another injury accident where the driver fled and power lines were down; and two (2) deputies remained to patrol Washington County, a 425 [sic, 432] square mile county. [R.114:79-80; R.113:67-70, 83-86, 89, 90] The circuit court found that no other law enforcement officer would have been available to get the warrant for Deputy Stolz if he wanted.[2] [R.114:22, 23, 29, 32, 47, 80]

The circuit court found that,

> … given that approximately two hours had elapsed from the time of the dispatch to the time of reading the Informing the Accused and the refusal of the Defendant, it was simply not reasonable to think that the officer could have been able to get the warrant and get the blood within three hours of the dispatch. It's almost certain it

[2] The circuit court found that the presence of fire department personnel was insignificant as they are not able to help law enforcement obtain a search warrant. [R.114:17, 80]

> would have been well over three hours from the time of dispatch to the time of blood draw, had the deputy gone through the procedures of getting a warrant.
>
> So I find that the deputy reasonably believed that there were exigent circumstances here, and that the delay in getting a warrant would have … threatened the destruction or dissipation of evidence of the alcohol concentration in the Defendant's blood. I find the deputy's decision was reasonable under the totality of circumstances, and that a search warrant was not required.

[R.114:82] The circuit court's findings are not clearly erroneous.

Courts have recognized that evidence of alcohol in the bloodstream is highly probative because the driver's blood alcohol concentration level alone is enough to obtain a driving with a prohibited alcohol concentration conviction. A conviction for driving with a prohibited alcohol concentration requires a minimum concentration of blood alcohol; thus, the amount of alcohol (and the dissipation of alcohol) in the blood is relevant to a conviction. *See e.g.,* ***State v. Parisi***, 2016 WI 10, ¶¶ 82-83, 367 Wis. 2d 1, 875 N.W.2d 619 (Bradley, J., dissenting).

The circuit court correctly found Wisconsin's three-hour rule, under § 885.235, Wis. Stat., to be an appropriate

factor to consider in determining whether exigency justified a warrantless nonconsensual blood draw. [R.114:82-84] Section 885.235 Wis. Stat., is the legislative edict that a properly authenticated sample taken within three hours is presumptively admissible. *See* ***State v. Disch***, 119 Wis. 2d 461, 470-72, 351 N.W.2d 492 (1984).

McNeely does not specifically address or prohibit consideration of three hours in the determination of exigency. Rather, the ***McNeely*** court specifically noted,

> the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that *must* be considered in deciding whether a warrant is required. No doubt, … cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law *must* be concerned that evidence is being destroyed.

McNeely, 133 S. Ct. at 1568 (emphasis added). Nothing in ***McNeely*** overturns the statutory directive of § 885.235, Wis. Stat. Consideration of the three-hour rule in obtaining a blood sample without a search warrant was reasonable.

Mr. Dalton contends that Deputy Stolz had probable cause to arrest him immediately at the scene of the crash and he should have attempted to obtain a search warrant for his

blood at that time, shortly after 10:07 p.m. Mr. Dalton wants this Court to engage in Monday-night quarterbacking of Deputy Stolz's judgment of probable cause for an arrest. According to Mr. Dalton, Deputy Stolz should not have taken the time to complete a thorough investigation, but rather should have sought to obtain a warrant for blood after a cursory one. Mr. Dalton's argument is misguided.

Exigent circumstances framework does not evaluate, after-the-fact, at what point during an investigation the officer should have sought to get a search warrant. Rather, the exigency analysis focuses on whether, under the totality of the circumstances, exigent circumstances justified the warrantless blood draw based on the facts that existed at the time of the warrantless draw. ***Tullberg***, 2014 WI 134 at ¶ 42. Would a reasonable law enforcement officer, confronted with this accident scene and these circumstances, reasonably conclude that the totality of the circumstances rendered a warrantless blood draw necessary? *See* ***id.*** at ¶ 43. The test is "an objective one based on 'the circumstances known to the

officer at the time,'" ***Parisi***, 2016 WI 10 at ¶ 45 (citation omitted), that recognize officers are often forced to make "split-second judgments." ***Id.*** at ¶ 50 n. 15.

Section 343.305(3), Wis. Stat., directs "*upon arrest* … for violation of s. 346.63(1) … where the offense involved the use of a vehicle, a law enforcement officer may request the person to provide one or more samples of his or her … blood … for the purpose specified under sub. (2)…." Inevitably, had Deputy Stolz immediately upon arrival on scene – prior to completing his investigation or even on his drive down to Froedtert – sought a warrant for Mr. Dalton's blood, Mr. Dalton would be arguing for suppression for his failure to follow the implied consent procedure under § 343.305(2) - (4), Wis. Stat., and a lack of probable cause for the arrest. Here, Mr. Dalton concedes probable cause for convenience and argument sake. Law enforcement officers do not have that luxury. The circuit court recognized this fact. [R.114:85-86]

Mr. Dalton imparts improper delay or dilatory tactics on the Washington County Sheriff's Department because of the in-person procedure for obtaining search warrants in Washington County. Law enforcement personnel apply to a judge for a search warrant. Sec. 968.12, Wis. Stat. As Captain Schulteis explained this procedure is set by the judges, not by the Sheriff's Department. [R.113:86] All search warrants must be applied for in person prior to ***McNeely*** and after ***McNeely***.

If the judge requires the application be sworn in person, then the officer can either comply with the procedure or not apply for search warrants. ***McNeely*** does not mandate a Hobson's choice for officers. The fact that § 968.12, Wis. Stat., authorizes other methods is irrelevant until or unless adopted in the county as the judicially-mandated procedure.

While an officer should not improperly delay, creating the exigent circumstances, *see* ***Tullberg***, 2014 WI 134 at ¶ 44, the circuit court explored the circumstances facing Deputy Stolz and found that Deputy Stolz could not have gotten to

the point where he needed to make a decision for the warrantless blood draw any sooner. [R.114:85-86, 87-88] The circuit court further noted that Deputy Stolz was told by the shift commander that due to other calls for service, no other officers were available to assist in obtaining a warrant. Deputy Stolz was on his own. [R.114:86-87]

The circuit court further noted that Mr. Dalton did not engage in any dilatory tactics either, but that the delay was caused by "a complex, time-sensitive, and medically-sensitive situation." [R.114:88] The circuit court found that "these special factors" contributed to its conclusion that there were exigent circumstances to justify the warrantless blood draw. [R.114:86-88, 88]

Although the delay was not occasioned by Mr. Dalton, much like the deputy in ***Tullberg***, Deputy Stolz reasonably responded to the crash, secured the scene, ensured appropriate medical treatment for Mr. Dalton and his passenger, investigated the matter, and once it was clear no additional information would be gleaned from Mr. Dalton, he was left

with a very narrow time frame in which Mr. Dalton's blood could be drawn so as to produce reliable evidence of intoxication. *See* ***Tullberg***, 2014 WI 134 at ¶¶ 49-50; *see also*, ***Parisi***, 2016 WI 10 at ¶¶ 12-13, 41, 50 n.15 (The Supreme court held it was reasonable for officer to wait two hours in waiting room until Parisi was medically cleared for nonconsensual warrantless blood draw). Delaying the blood draw would have significantly undermined its efficacy. *See* ***McNeely***, 133 S.Ct at 1561. Exigent circumstances justified the warrantless blood draw of Mr. Dalton's blood. Deputy Stolz acted reasonably.

The fact that other deputies had initially been dispatched to the accident scene does not undermine the reasonableness of Deputy Stolz's decision to forego a search warrant. The circuit court found that due to the complicated and fluid situation, the request for a blood test was delayed. [R.114:84-88] The delay was not caused by Deputy Stolz or Mr. Dalton – it was, in part, due to Mr. Dalton's significant medical issues that needed to be addressed prior to the officer

having contact with him. [R.114:87-88] Deputy Stolz did not create the exigency. [R.114:88] *Cf.* ***Parisi***, 2016 WI 10 at ¶ 50 n. 15 (Supreme Court rejected Parisi's arguments that a warrant could have been pursued because of five to seven officers involved in the case and the delay that occurred while hospital staff stabilized Parisi. "[T]he exigency is not eliminated merely because there are multiple officers at the scene.")

Moreover, as the circuit court recognized, Deputy Stolz had no reason to believe that Mr. Dalton would refuse to do what he impliedly consents to do every time he elects to operate a motor vehicle in Wisconsin. [R.114:85] Wisconsin courts have interpreted the implied consent law as recognizing that alcohol concentration, i.e., evidence of intoxication, dissipates with time and thereby impacts the relevance and admissibility of the blood test. *See* ***State v. Piddington***, 2001 WI 24, ¶ 43 n. 24, 241 Wis. 2d 754, 623 N.W.2d 528 (time is of the essence in obtaining evidence of blood alcohol concentration for both the State and

defendants). There is no way Deputy Stolz could have gotten to the point where Mr. Dalton refused any sooner [R.114:87-88]; and when he did, Deputy Stolz needed to make an immediate decision between exigency or warrant. [R.114:88]

Under the totality of all of the circumstances facing Deputy Stolz at approximately 12:05 a.m., he had an objectively reasonable belief that he faced an exigency, and any delay in obtaining a warrant would jeopardize and threaten the destruction of evidence – that is the dissipation of alcohol in Mr. Dalton's blood. Deputy Stolz's decision, under the particular circumstances of this case, were reasonable and therefore, a search warrant was not required. [R.114:87-88] *See* ***Schmerber***, 384 U.S. at 770-71.

Mr. Dalton cites to ***State v. Howes***, 2017 WI 18, 373 Wis. 2d 468, -- N.W. 2d --, in support of his argument that Deputy Stolz should have obtained a search warrant just after being dispatched at 10:07 p.m. Mr. Dalton does not acknowledge that in ***Howes***, there was no majority opinion of precedential value. *See* ***Landis v. Physician's Ins. Co. of***

Wisconsin, Inc., 2001 WI 86, ¶ 66, 245 Wis. 2d 1, 628 N.W.2d 893. One holding involved exigent circumstances, ***Howes***, 2017 WI 18 at ¶ 51, with two justices concurring; one holding addressed the constitutionality of Wisconsin's implied consent law authorizing a warrantless blood draw from an unconscious driver based on the driver's implied consent, ***id***. at ¶ 52, two justices concurring in the result with opinion; and two justices dissented with one justice joining in part. ***Id.*** at ¶¶ 50, 85-88, 89, 151-154. Because no opinion in ***Howes*** garnered a majority vote, the significance of any holding is limited.

The relevance of ***Howes***, if any, confirms Deputy Stolz did not have probable cause to arrest Mr. Dalton within two to three minutes of contact before rescue personnel began to extract Mr. Dalton from the vehicle. Deputy Stolz was dispatched at 10:07 p.m. and arrived at 10:12 p.m. [R.114:7, 9] Deputy Stolz approached the vehicle – he observed Mr. Dalton was unconscious, he would not wake up and he had a strong odor of alcohol. [R.114:12, 38] Simultaneously, he

spoke to the passenger and learned that Mr. Dalton was the driver, he was driving aggressively, lost control, went into the ditch and rolled several times. [R.114:9-10] He also learned they had been drinking, unknown quantity or type of alcohol, sometime prior to the crash. [R.114:38] This conversation lasted about two to three minutes before rescue personnel began to extricate Mr. Dalton from the vehicle for medical transport. [R.114:10, 12] It is at this point in time, approximately 10:14 p.m. to 10:15 p.m. that Mr. Dalton contends Deputy Stolz should have sought a warrant for Mr. Dalton's blood. Case law suggest otherwise.

As in ***Howes***, probable cause in this case developed over a period of time. *Cf.* ***Howes***, 2017 WI 18 at ¶ 34. After Mr. Dalton was extricated from the vehicle, he was transported for medical treatment. This was at approximately 10:30 p.m. to 10:35 p.m. [R.114:12, 14] Deputy Stolz remained on scene conducting his investigation. [R.114:16] Deputy Stolz requested a deputy proceed to Community Memorial Hospital in Menomonee Falls to speak further with

the passenger. [R.114:18; R.113:47] At approximately 11:14 p.m., Deputy Stolz was en route to Froedtert to continue his investigation. [R.114:21]

Prior to making contact with Mr. Dalton, Deputy Stolz spoke to his shift commander. He was told to continue his investigation, go through the OWI process, and was told there were no officers available to assist with a search warrant, if needed. [R.114:23, 33, 34-35, 40, 47] Upon arrival at the hospital, Deputy Stolz proceeded to the emergency room/ICU and waited for the doctors and nurses to provide Mr. Dalton medical treatment. [R.114:26, 41] After Mr. Dalton received medical treatment, he was conscious and Deputy Stolz was able to speak to him. [R.114:28, 34] Deputy Stolz observed Mr. Dalton had glassy, bloodshot eyes; he noticed the strong odor of alcohol coming from his breath; and his eye movements appeared lethargic. [R.114:38-39] Deputy Stolz did not have Mr. Dalton perform standard field sobriety tests due to unknown injuries and his condition. [R.114:39, 44]

Based on the totality of his investigation, Deputy Stolz then told Mr. Dalton he was under arrest and at 12:05 a.m., he read the Informing the Accused form to him. [R.114:28] When asked if he would submit to a blood draw, Mr. Dalton aggressively stared at Deputy Stolz, said "No. Fuck you. Get the fuck away from me." [R.114:28] The blood draw was taken at 12:14 a.m. [R.114:31] Deputy Stolz requested Mr. Dalton's blood be drawn without a warrant under exigent circumstances – Mr. Dalton's alcohol level was going to decrease. [R.114:30, 46]

Certain facts are particularly relevant to an exigent circumstances analysis in drunk-driving cases, such as delay due to the defendant's medical condition or time to investigate the scene. *See* ***Howes***, 2017 WI 18 at ¶ 43-49. Both were present in this case.

Additionally, the medical facility was approximately 45 minutes outside of Washington County. No other officers were available to assist with a warrant; it would have taken Deputy Stolz an additional two hours to obtain a search

warrant for Mr. Dalton's blood with approximately two hours having already elapsed since the time of driving. Deputy Stolz reasonably concluded that the additional two hours before obtaining a blood draw would have undermined the efficacy of the blood analysis due to the destruction of evidence. ***Howes*** does not dictate anything different. *See* ***Howes***, 2017 WI 18 at ¶ 40, 43-50 (*citing to* ***Schmerber***, 384 U.S. at 770-71; and ***Tullberg***, 2014 WI 134 at ¶¶ 48-50).

Trial counsel, Attorney Herda, was not deficient for failing to file a meritless motion to suppress under ***McNeely***. As the circuit court noted, Attorney Herda had several years of experience in criminal law work, she was mentored, and she was qualified to handle Mr. Dalton's case. [R.114:88-89; R.113:7, 15-17] Attorney Herda testified that she went over the discovery with Mr. Dalton, she met with Mr. Dalton, she conducted independent investigation, she was familiar with ***Missouri v. McNeely***, she read the case law, she discussed it with her client, she advised him she did not think there was a basis for suppression, and he, on her advice, decided not to

proceed with the motion. [R.114:89; R.113:8, 11-13, 18-26, 27-28] Although she also testified she would have proceeded with the motion had Mr. Dalton wanted her to do so. [R.114:90; R. 113:23]

The circuit court found that Attorney Herda exercised reasonable professional judgment. [R.114:90] The circuit court found that had the motion been brought, it would have been denied. [R.114:90] Accordingly, Attorney Herda's failure to file a meritless motion did not constitute deficient performance. As a result, Mr. Dalton has not established that he is entitled to withdraw his plea based on ineffective assistance of trial counsel.

II. THE CIRCUIT COURT APPROPRIATELY EXERCISED ITS DISCRETION WHEN IT OUTLINED AGGRAVATING FACTORS, INCLUDING MR. DALTON'S REFUSAL, WHEN IMPOSING SENTENCE. *BIRCHFIELD v. NORTH DAKOTA*, 579 U.S. __, 136 S. Ct. 2160 (2016), IS INAPPOSITE.

At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of

the community, the punishment and rehabilitation of the defendant and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶ 23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance. ***State v. Gallion***, 2004 WI 42, ¶ 41, 270 Wis. 2d 535, 678 N.W.2d 197. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Gallion***, 2004 WI 42 at ¶ 46.

Mr. Dalton does not assert that the Court failed to follow the dictates of ***Gallion***. Rather, Mr. Dalton claims that the circuit court erred by imposing harsher criminal penalties because Mr. Dalton exercised his "constitutional right" to refuse a warrantless draw of his blood. Mr. Dalton looks to ***Birchfield v. North Dakota***, 579 U.S. __, 136 S. Ct. 2160 (2016), in support of his claim. ***Birchfield*** is inapposite.

The circuit court found that ***Birchfield*** was distinguishable as Wisconsin does not criminalize a refusal, but is clear in its approval of implied consent laws like Wisconsin's. [R.114:93, 94] The circuit court noted that

increasing a punishment of a defendant because of his refusal is not the same as making that refusal a crime. [R.114:93] The circuit court pointed out that Mr. Dalton was not exposed to any additional penalties outside of the statutory framework for the OWI second offense that was charged. [R.114:94] The circuit court determined that it properly considered mitigating and aggravating factors, including the refusal in making its sentence. [R.114:94]

Wisconsin does not impose criminal penalties for a refusal; rather, Wisconsin's implied consent law imposes civil sanctions. *See* § 343.305, Wis. Stat. The ***Birchfield*** Court supports such sanctions,

> Our prior opinions, [e.g. ***McNeely***] have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequence on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws and nothing we say here should be read to cast doubt on them.

Birchfield, 136 S. Ct. at 2185 (citations omitted).

Thus, ***Birchfield*** implicitly, if not explicitly, upholds the constitutionality of Wisconsin's Implied Consent law: a driver in Wisconsin has no right to refuse a chemical test

without consequence. This has been the "long-standing repeated holdings of Wisconsin courts." *See e.g.*, ***State v. Lemberger***, 2017 WI 39, ¶¶ 20-28, 30, 32-33, -- Wis. 2d --, -- N.W.2d – (opinion filed April 20, 2017); ***Howes***, 2017 WI 18 at ¶ 15 (Gableman, J, concurring). ***Birchfield*** affirms this position.

Moreover, defendant did not suffer criminal penalties for refusing to submit to a blood test. The defendant was not charged with a crime subject to fines or confinement related to his refusal. *Cf.* ***Birchfield***, 136 S. Ct. at 2186. Nor did he receive a sentence outside of the proscribed penalties for an operating while intoxicated charge, second offense. [R.1, R.9, R.23, R.50]

The sentencing court has the discretion, within the legislatively-determined scope, to fashion a sentence based on numerous factors. *See* ***State v. Horn***, 226 Wis. 2d 637, 646, 594 N.W.2d 772 (1999). Although circuit courts should impose the minimum amount of custody necessary,

> "minimum" does not mean "exiguously minimal," that is insufficient to accomplish the goals of the criminal

> justice system – each sentence must navigate the fine line between what is clearly too much time behind bars and what may not be enough…. [N]o appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion.

State v. Ramuta, 2003 WI App 80, ¶ 25, 261 Wis. 2d 784, 661 N.W.2d 483.

The circuit court specifically found this to be an aggravated case. [R.111:17] The circuit court listed multiple aggravating factors: the dangerous driving, uncooperative with officers, endangering self and others, significant criminal record, open intoxicants, recent prior operating while under the influence conviction, high alcohol level, extremely dangerous driving, age, along with the refusal to consent to a blood draw. [R.111:15-17] The circuit court was aware of the fact that Mr. Dalton was on probation which was revoked, in part, because of this offense. [R.111:3-4] The circuit court sentenced Mr. Dalton to 180 days jail to run consecutive to the probation revocation sentence Mr. Dalton was serving. [R.111:17] It is clear that the circuit court placed emphasis on a separate punishment for the aggravated nature of Mr. Dalton's offenses, the refusal being one of several factors.

Nothing in ***Birchfield*** precludes a circuit court from considering the cooperation, or lack thereof, of an individual during his or her contact with an officer during the course of sentencing.

Mr. Dalton further asserts ***McNeely*** elevated the right to refuse to submit to a chemical test to a constitutional right. [Resp. Br:32-33, 35] ***McNeely*** simply does not stand for this proposition.

As the Wisconsin Supreme Court has recognized, ***McNeely*** abrogated its decision in ***State v. Bohling***, 173 Wis. 2d 529, 547-48, 494 N.W.2d 399 (1993), to the extent that the ***Bohling*** court held the natural dissipation of alcohol in a person's bloodstream constitutes a *per se* exigency so as to justify a warrantless nonconsensual blood draw under certain circumstances. *See* ***State v. Foster***, 2014 WI 131, ¶ 6, 360 Wis. 2d 12, 856 N.W.2d 847. Post-***McNeely***, law enforcement has three means by which to obtain an evidentiary chemical test of an individual's blood for

evidence of intoxication:[3] (1) consent, under the implied consent law, *see* § 343.305, Wis. Stat.; (2) a search warrant, *see* ***McNeely***, 133 S.Ct. at 1561; or (3) exigent circumstances justifying a warrantless blood draw, *see* ***McNeely*** at 1558-59, 1561-63.

McNeely has not changed the implied consent law; rather, ***McNeely*** clarified law enforcement action if implied consent is withdrawn by a driver accused of operating a vehicle while under the influence. *See* ***Lemberger***, 2017 WI at ¶¶ 28, 33. ***McNeely*** also did not address or change appropriate sentencing factors for a circuit court to consider under ***Gallion***, such as a particular individual's cooperation, or lack thereof, with an investigation by law enforcement. *See* ***Lemberger***, 2017 WI at ¶ 33 n.11.

An appropriate discretionary determination is made when the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational

[3] Notably, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but a blood test cannot be "administered as a search incident to a lawful arrest for drunk driving." ***Birchfield v. North Dakota***, 579 U.S. __, 136 S. Ct. 2160 (2016); *cf.*, ***Schmerber***, 384 U.S. at 769-71 (outlining exigency exception).

process, reached a conclusion that a reasonable judge could reach. ***In re the Marriage of Covelli v. Covelli***, 2006 WI App 121, ¶ 13, 293 Wis. 2d 707, 718 N.W.2d 260. An appellate court may reverse a discretionary decision if the circuit court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts. *See* ***State v. Fernandez***, 2009 WI 29, ¶ 50, 316 Wis. 2d 598, 764 N.W.2d 509. The circuit court considered the aggravated nature of Mr. Dalton's offenses, the refusal being one of a multitude of factors justifying the consecutive sentence. The circuit court properly exercised its discretion when it imposed Mr. Dalton's sentence.

CONCLUSION

For the reasons given, it is respectfully submitted that the order denying Mr. Dalton's post-conviction motion be affirmed. It is further submitted that Mr. Dalton's alternative request for resentencing be denied and the judgment of conviction be affirmed.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stat., for a brief and appendix produced with a proportional serif font. I certify the length of this brief is 6475 words.

Dated this 27th day of April, 2017.

/s/ Stephanie L. Hanson
Stephanie L. Hanson
Deputy District Attorney

CERTIFICATE OF COMPLIANCE WITH § (RULE) 809.9(12), WIS. STAT.

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § (Rule) 809.19(12), Wis. Stat.

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of April, 2017.

/s/ Stephanie L. Hanson
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